No. 86-1617

In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

LORRAINE POLASKI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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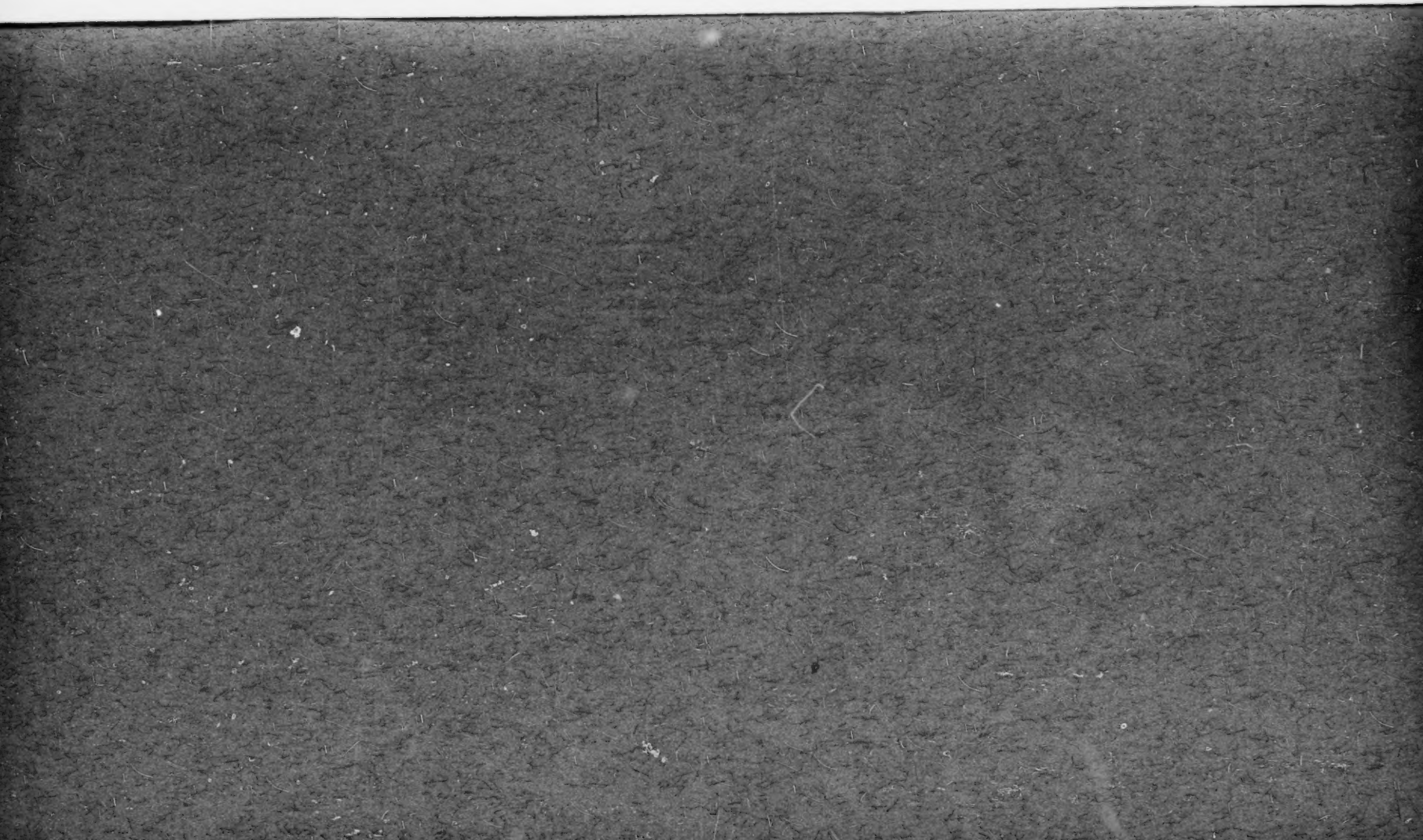

TABLE OF AUTHORITIES

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1. Respondents concede (Br. in Opp. 24) that it is "palpable and grievous error" for a court to order the reopening of closed claims where the court has sustained the Secretary's policies governing decision of those claims. Accordingly, respondents state (Br. in Opp. 24-25) that if the Eighth Circuit is found to have ordered class-wide reopening relief in this case while approving the Secretary's policies concerning the evaluation of pain, "this [C]ourt, rather than simply granting certiorari, should grant certiorari and summarily reverse." Since that is precisely what the court of appeals has done, we agree with respondents that this error warrants the grant of certiorari.

Respondents seek to avoid that consequence by arguing that the court of appeals did not actually sustain the Secretary's pain policies and that its reopening order is justified because the Secretary had applied unlawful policies and standards on a system-wide basis. See Br. in Opp. 2, 4, 10, 13, 15, 25-26, 27, 36, 39-41, 46. Respondents are wrong. Although the district court held that the

Secretary's official policies regarding the evaluation of pain were unlawful (Pet. App. 59a-65a), the court of appeals held that the relevant regulatory provisions were consistent with the Social Security Act and Eighth Circuit precedent and had been ratified by Congress (*id.* at 19a-20a).

The Secretary's "policies" and "standards" that bind decision-makers in their evaluation of pain are set forth in 20 C.F.R. 404.1529 and Social Security Ruling (SSR) 82-58.[1] It was accordingly upon that Regulation and Ruling that respondents focused their challenge, and the district court concluded that both provisions were inconsistent with Eighth Circuit precedent (Pet. App. 59a-63a). In particular, the district court believed that even the reference in 20 C.F.R. 404.1529 to a "reasonable" relationship between the impairment and the alleged severity of the pain was impermissible under Eighth Circuit decisions (Pet. App. 60a).

The validity of 20 C.F.R. 404.1529 and SSR 82-58 also was the central issue on the merits in the court of appeals. Thus, respondents' argument that the Secretary's pain policies were unlawful and inconsistent with Eighth Circuit precedent rested on the premise that 20 C.F.R. 404.1529 and SSR 82-58 were invalid, and that the

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[1] 20 C.F.R. 404.1529 states that a claimant will not be found disabled based on his symptoms, including pain, "unless medical signs or findings show that there is a medical condition that could be reasonably expected to produce those symptoms." SSR 82-58 in turn states that "[s]ymptoms can sometimes suggest a greater severity of impairment than is demonstrated by objective medical findings alone" and that "[t]he effects of symptoms must be considered in terms of any additional physical or mental restrictions they may impose beyond those clearly demonstrated by the objective physical manifestations of disorders" (Gov't C.A. Br. Addendum D at 3). SSR 82-58 further explains that because pain and other symptoms are subjective and cannot be quantified, any functional limitations attributable to symptoms must be inferred from objective physical findings, medical knowledge of expected symptom-related effects, the alleged frequency and duration of the pain, precipitating and aggravating circumstances, the claimant's daily activities, effects of medication, and recorded observations by physicians and disability decision-makers (*ibid.*).

Appeals Council therefore had erred by relying on those provisions in several recent cases. Resp. C.A. Br. 21-31. The Secretary, on the other hand, argued that 20 C.F.R. 404.1529 and SSR 82-58 were consistent with Eighth Circuit precedent because they required that serious consideration be given to subjective complaints of pain even where such complaints were not fully supported by objective medical evidence. Gov't C.A. Br. 18-21, 25-26.

After oral argument, the Secretary and respondents entered into an agreement on the pain issue, which the court of appeals approved in July 1984 as consistent with circuit precedent (Pet. App. 30a-34a). Significantly, the agreement did *not* state that 20 C.F.R. 404.1529 and SSR 82-58 were invalid, as respondents theretofore had maintained and as the district court had held. To the contrary, the agreement quoted and paraphrased SSR 82-58 as setting forth the governing principles (Pet. App. 32a-33a), while stating that "some adjudicators" had "misinterpreted the Secretary's policies as enunciated in SSR 82-58" (Pet. App. 32a). The necessary premise of this statement was that the Secretary's policies were *valid* and that any errors in the past were attributable to deviations from those policies in the adjudication of particular cases.

The July 1984 agreement, which respondents voluntarily joined and the court of appeals approved, thus conclusively refutes respondents' central contention before this Court—that the court of appeals' reopening order was justified because of an unlawful, system-wide policy governing the evaluation of pain. The court of appeals in fact made no mention of *any* policy, unlawful or otherwise, in its opinion requiring reopening following the remand from this Court for further consideration in light of *Bowen* v. *City of New York*, No. 84-1923 (June 2, 1986) (see Pet. App. 1a-2a). And although the court of appeals' December 31, 1984 opinion on the exhaustion issue did note respondents' *contention* that adjudicators at every level had applied an improper standard (*id.* at 24a), the court expressly held that 20 C.F.R. 404.1529 and SSR 82-58 were valid and had been ratified by Congress (Pet.

App. 19a-20a), and it merely quoted the agreement's reference to errors by "some adjudicators" in interpreting those policies (*id.* at 24a).

As respondents concede, a court has no authority to order the reopening of closed claims where, as here, the policies governing those claims are found to be lawful. This Court made clear in *City of New York* that exhaustion may not be excused even in an individual suit under 42 U.S.C. 405(g) if the plaintiff "alleg[es] mere deviation from the applicable regulations in his particular administrative proceeding," since "such individual errors are fully correctable upon subsequent administrative review" (slip op. 16-17). *A fortiori*, in a class action, a court has no authority to order the reopening of *all* individual claims on the ground that errors might have occurred in the application of valid regulations to *some* individual claims by *some* SSA decision-makers. Cf. *ICC* v. *Brotherhood of Locomotive Engineers*, No. 85-792 (June 8, 1987), slip op. 6-8.

2. Respondents also ignore the significance of Congress's ratification of 20 C.F.R. 404.1529 and SSR 82-58 when it enacted Section 3 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 86-460, 98 Stat. 1799. Compare *Bowen* v. *Yuckert*, No. 85-1409 (June 8, 1987), slip op. 11-14. As we have explained (Pet. 21-22 & nn. 11-12), Congress acted for the specific purposes of overturning judicial decisions that had attached too much weight to subjective complaints of pain and of terminating then-pending judicial challenges to the Secretary's pain policies, including this very case. The holding below that the Secretary nevertheless must provide for the reopening of thousands of claims that were governed by the policies that Congress ratified is completely inconsistent with this considered legislative judgment.

Respondents refer to Section 3 of the 1984 Act only in passing, stating that it "implement[s] the policies concerning evaluation of pain * * * embodied in the [July 1984] settlement agreement," policies that "require careful individualized evaluations and a reasonable rela-

tionship between pain and objective findings" (Br. in Opp. 28). But that is exactly what 20 C.F.R. 404.1529 and SSR 82-58 had required all along, even before the parties entered into the settlement agreement (see page 2 & note 1, *supra*), and it was those regulatory provisions (not the settlement agreement) that governed respondents' claims and that Congress ratified in 1984. This ratification contrasts sharply with Congress's disapproval of the Secretary's approach to the evaluation of mental impairments, at issue in *City of New York*. See Pet. 20-21.

3. Respondents' attempts to reconcile the decision below with *City of New York* (see Br. in Opp. 29-42) are flawed in other respects as well. First, *City of New York* makes clear that exhaustion may be dispensed with only in "unique circumstances" (slip op. 17). Yet respondents have not shown that this case is unique in *any* respect that would warrant the mandatory reopening of thousands of defaulted claims. To the contrary, the court of appeals' and Congress's approval of 20 C.F.R. 404.1529 and SSR 82-58 renders this case uniquely *inappropriate* for such relief.

Second, respondents do not dispute our submission (Pet. 11, 16-17) that here, unlike in *City of New York*, the challenged policies were not "unrevealed" or "secret" (slip op. 17), such that the Secretary might be held responsible for the class members' failure to seek administrative review. Respondents attempt to downplay this important difference by contending (Br. in Opp. 31) that secretiveness was not "an essential element in the Court's analysis" in *City of New York*. But as respondents concede (Br. in Opp. 31 n.15), this Court *twice* referred to the secret nature of the challenged policy in its exhaustion ruling in *City of New York*. Indeed, the Court stated that the claimants there "[stood] on a different footing from one arguing merely that an agency incorrectly applied its regulations" precisely because "the District Court found a systemwide, *unrevealed policy* that was inconsistent in critically important ways with established regulations" (slip op. 17 (emphasis added)).

Third, contrary to respondents' contention (Br. in Opp. 37-38), this case differs from *City of New York* with respect to the possible hardship to claimants. The courts below relied on the financial hardship that class members might experience as a result of the denial of their claims (Pet. App. 23a-24a, 68a-71a). But as Congress well knew, virtually any disappointed claimant might make such an allegation, and yet Congress incorporated the administrative appeal process, including the exhaustion requirement, into the disability programs. See Pet. 14-15. By contrast, the Court in *City of New York* observed that the "class members *not only* were denied the benefits they were seeking," but also that " '[t]he ordeal of having to go through the administrative appeal process may trigger a severe medical setback' " (slip op. 15 (emphasis added; citation omitted)). In this case, there was no such finding that pursuit of administrative remedies would itself cause injury.

Fourth, respondents err in seeking to derive support from *City of New York* for the notion (Br. in Opp. 36) that the legal issues raised by the class members here were "substantially collateral" to their claims for benefits in the same manner as the asserted right to a pretermination hearing was found to be "entirely collateral" to the claim for benefits in *Mathews* v. *Eldridge*, 424 U.S. 319, 330 (1976). The latter was a classic example of an issue that was "completely separate from the merits of the action" under the collateral-order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 473 (1978). By contrast, neither respondents' challenge to the weight attached to subjective complaints of pain in the adjudication of their claims on the merits, nor their contention that the decisions denying their claims on the merits should now be reopened, is "entirely" or even "substantially" collateral to their claims for benefits. The Court in *City of New York* did observe that the contentions advanced on behalf of the class members there were "collateral" in the sense that they did

not actually ask the court to award them benefits, but rather challenged the Secretary's failure to follow applicable regulations (slip op. 15). But the Court did not suggest that that characterization would suffice to permit a court to order the reopening of closed claims. If such a characterization did suffice, there would never be repose in the disability programs, so long as a class of claimants refrained from seeking an actual award of benefits from the court.[2]

4. Respondents also contend (Br. in Opp. 42-50) that this case presents "compelling" reasons for judicial waiver of the exhaustion requirement because the Secretary allegedly "refus[ed]" to follow Eighth Circuit precedent regarding the evaluation of pain. This contention is frivolous. The district court did believe that 20 C.F.R. 404.1529 and SSR 82-58 were inconsistent with Eighth Circuit precedent, and it ordered the Secretary to reopen closed claims on that basis (Pet. App. 58a-65a). But as the Secretary argued on appeal (Gov't C.A. Br. 23-27), the Regulation and Ruling in reality were fully consistent with Eighth Circuit precedent. The fact that the Eighth Circuit had reversed a handful of SSA decisions involving pain, out of the thousands of such decisions rendered within that circuit, showed only that valid policies had been misapplied by some adjudicators in individual cases. Indeed, in all of the cases cited by respondents and the courts below (Pet. App. 24a-25a, 56a-57a), the district court had *affirmed* the Secretary's denial of benefits,

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[2] Contrary to respondents' contention (Br. in Opp. 41-42 & n.17, 46), the Secretary's policies concerning the evaluation of pain bear no resemblance to the policy concerning mental impairments at issue in *City of New York*. There, the Court found that the state agency had applied a conclusive presumption that mentally impaired claimants who did not meet or equal the listings retained sufficient residual functional capacity to do at least unskilled work. In this case, by contrast, the governing Regulation and Ruling provided for an individualized assessment of pain, based on the claimant's subjective complaints, objective medical evidence, precipitating and aggravating circumstances, and the claimant's daily routine, medication and demeanor.

thereby refuting the notion that those cases represented instances of deliberate "non-acquiescence" in clearly established circuit law.

More importantly, the question of the consistency between the Secretary's policies and Eighth Circuit precedent was rendered moot by Congress's ratification of the Secretary's policies when it passed Section 3 of the 1984 Act. See pages 4-5, *supra*. Congress specified in Section 3(a)(3) that the statutory pain standard (and therefore the administrative policies it ratified) "shall apply to determinations made prior to January 1, 1987" (98 Stat. 1799). The regulatory policies that respondents challenged thus were approved and made applicable by statute to the claims of the class members at issue here. Whether the Secretary's policies for the evaluation of pain were consistent with Eighth Circuit decisions construing the Social Security Act prior to passage of the 1984 Act therefore is irrelevant. Even the court of appeals observed that as a result of Congress's ratification of 20 C.F.R. 404.1529 and SSR 82-58 and the court's own approval of the settlement agreement in July 1984, "there is no longer a question of nonacquiescence on the part of the Secretary" (Pet. App. 20a).[3]

5. There likewise is no merit to respondents' suggestion (Br. in Opp. 50-51, 55) that the Court should deny review because only a preliminary injunction has been entered in this case. The court of appeals did not rely on the so-called "preliminary" nature of the relief ordered by the district court. The requirement that the Secretary reopen thousands of closed claims obviously goes far beyond "the usual 'prohibitory' injunction which

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[3] In any event, as we explain in our petition for a writ of certiorari (at 16-17) in *Bowen* v. *Hyatt*, No. 86-1861 (filed May 22, 1987), whatever policy considerations may bear on the matter, the Constitution does not inflexibly mandate that the Secretary apply a court of appeals' legal reasoning in a single decision involving an individual claimant to the adjudication of the claims of *all* individuals in the circuit. The effect of such a rule would be to convert every individual disability case into a class action, but only if the claimant wins.

merely freezes the positions of the parties until the court can hear the case on the merits." *Heckler* v. *Lopez*, 463 U.S. 1328, 1333 (1983) (Rehnquist, Circuit Justice).

6. Finally, respondents err in attempting to minimize the importance of this case. They argue (Br. in Opp. 21), for example, that not all class members will actually request that their claims be readjudicated.[4] But respondents do not dispute that many *will* request readjudication in response to the notices the court of appeals has ordered to be sent, and the scope of the relief must in any event be measured by the Secretary's legal obligation to the class as a whole. Moreover, even if some class members ultimately do not respond, the Secretary must bear the substantial and unwarranted threshold burden of identifying and notifying thousands of class members of their right to readjudication.

In a related vein, respondents argue (Br. in Opp. 19-20) that the number of claimants who must be afforded an opportunity to have their claims readjudicated is less than the 8000 estimated in the petition (Pet. 8, 22), because some of those 8000 individuals, who received initial determinations denying their claims during the period defining class membership, might have sought administrative review and had their claims properly resolved after July 17, 1984. Respondents overlook the fact that any such reduction would be offset by the inclusion of additional claimants who received initial determinations prior to the class period but whose claims were again denied on administrative appeal during that period. The relief for the class members in this case (and the 9500 claimants

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[4] Relying on experience in two of the numerous medical improvement class actions (see Br. in Opp. 21 n.10), respondents estimate that between 20% and 25% of the affected class members would request readjudication in response to a notice. However, we have been informed by HHS that the response rate has been far higher—approaching or even exceeding 50%—in certain other class actions, such as the *Dixon* case in New York and the *Wilson* case in the Third Circuit, which involve challenges to the severity regulation. See *Bowen* v. *Dixon*, petition for cert. pending, No. 86-2; *Bowen* v. *Wilson*, petition for cert. pending, No. 86-897.

in the parallel *Boyd* case (see Pet. 22)) therefore represents a substantial intrusion into the administrative process.

Beyond the impact of this case alone, the decision below warrants review from a broader perspective. Respondents make no effort to rebut our submission (Pet. 22-23) that there are numerous other class actions arising under the disability programs that involve similar issues of exhaustion and the unwarranted reopening of thousands of closed claims.[5] In one of the pending cases, *Hyatt* v. *Heckler*, 807 F.2d 376 (4th Cir. 1986), which likewise involves a challenge to the Secretary's policies for the evaluation of pain, the Fourth Circuit has required the Secretary to afford an opportunity for the reopening and readjudication of an estimated 80,000 claims, even though Congress approved the challenged policies. On May 22, 1987, the Solicitor General filed a petition for a writ of certiorari seeking review of the Fourth Circuit's decision in *Hyatt*. See *Bowen* v. *Hyatt*, No. 86-1861. The questions presented by this case therefore are of broad and recurring importance.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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JUNE 1987

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[5] See, *e.g.*, *State of New York* v. *Bowen*, No. 83 Civ. 5903 (RLC) (S.D.N.Y. Jan. 21, 1987) (decision regarding evaluation of cardiovascular impairments that, when implemented, will require the Secretary to provide for the reopening of an estimated 80,000 claims); *Luna* v. *Bowen*, 641 F. Supp. 1109 (D. Colo. 1986), appeal pending, No. 86-2480 (10th Cir.) (requiring reopening of an estimated 10,000 claims in a class action challenging pain policies).

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